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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 488

NATIONAL MARITIME UNION OF AMERICA, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND JOSEPH CURRAN, JACK LAWRENSON, JOSH LAWRENCE, CHESTER YOUNG, HAROLD MCCORMICK, MICHAEL MCBRIDE, AND CHARLES MONROE, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 937-946) is reported at 175 F. 2d 686. The findings of fact, conclusions of law, and order of the Board (R. 1-43) are reported at 78 N.L.R.B. 971.

JURISDICTION

The decree of the Court of Appeals (R. 963-969) was entered on August 5, 1949. By orders of Mr. Justice Jackson, dated October 12, 1949, and November 14, 1949 (R. 971, 927), the time within which a petition for a writ of certiorari might be filed was extended to and including December 21, 1949. The petition for a wit of certiorari was filed on December 19, 1949. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioners, by insisting upon the inclusion in any new agreement of a provision requiring that "all replacements shall be hired through the offices of the Union" where it is expressly recognized during negotiations that the labor organization will continue its practice of giving preference to its members in supplying replacements, and by conducting a strike in support of such demand, violated Section 8 (b) (2) of the Labor Management Relations Act.

2. Whether, in the absence of a complaint by a specific employee or group of employees that there has been discrimination against him or them, the Board may properly find that the N.M.U. has attempted to cause the Companies to discriminate against non-members of the N.M.U.

3. Whether petitioners, by insisting, as a condition precedent to entering into any agreement, that the Companies agree to include the provision referred to in Question No. 1, which would have the effect of requiring the Companies to give preference to N.M.U. members in hiring replacements, refused to bargain with the Companies, in violation of Section 8 (b) (3) of the Labor Management Relations Act.

4. Whether petitioners were denied due process of law and rights granted by the Administrative Procedure Act because the trial examiner refused to grant a continuance of the hearing where subsequently, during oral argument before the Board, counsel for petitioners stated that he did not want the case reopened or any further hearing but was requesting only that the Board incorporate as a part of the record the evidence regarding the hiring hall which the N.M.U. intended to introduce in another case scheduled for hearing in New York and where the Board granted this request.

5. Whether the restrictions imposed by Section 8 (a) (3) and 8 (b) (2) and (3) of the Labor Management Relations Act upon labor organizations and their agents deprive such parties or the employees of any constitutionally protected rights.

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C.,

Supp. II, 141 *et seq.*) are set forth in the Appendix, *infra,* pp. 27-32.

STATEMENT

Upon amended charges filed respectively by The Texas Company, Cleveland Tankers, Inc., Lake Tankers Corporation, and Great Lakes Transport Corporation, herein called the Companies, the Board issued a complaint against petitioners on June 2, 1948, and conducted a hearing on June 14, 15 and 16, 1948 (R. 45; 570-571, 601-603).[1] At the opening of the hearing, petitioners requested an adjournment on the ground that they and their counsel were engaged in court and in other administrative hearings relative to the very same matters upon which the complaint had been based (R. 1-2; 114-116). The trial examiner denied this request, whereupon petitioners withdrew from the hearing (R. 3; 121). On July 2, 1948, after the trial examiner had issued his intermediate report, petitioners filed a motion before the Board, requesting that the hearing be reopened to give them an opportunity to present their case, or, in the alternative, that the Board incorporate as a part of the record in this case the evidence regarding hiring halls operated by the National Maritime Union, herein called the N.M.U., which was to be introduced by petitioners in another proceeding then scheduled

[1] Wherever in a series of references semi-colons appear, the references preceding the semi-colons are to the Board's findings and those following the semi-colons are to the supporting evidence.

to be heard in New York (R. 3). The Board denied this motion (*ibid.*) Later, at oral argument before the Board, counsel for petitioners stated that he did not want the case reopened or any further hearing held because of the trial examiner's failure to grant an adjournment and that he was asking only that the Board incorporate as a part of the record the evidence regarding the hiring hall which petitioners intended to introduce in the other case which was scheduled to begin on the next day in New York (R. 3-4). The Board granted this request, and all evidence regarding the hiring hall introduced in the New York case was made a part of the record in this case (R. 4).

Upon the entire record, the Board, on August 17, 1948, issued its findings of fact, conclusions of law, and order (R. 1-43) which may be summarized as follows:

The contracts between the N.M.U. and each of the Companies executed prior to August 27, 1947, the effective date of the amended Act, and expiring on January 19, 1948, contained a provision known as the hiring hall clause reading as follows: (R. 5, 52-53, 73; 125-127, 209-212, 249-250, 605, 638-639, 713, 720):

> The Union agrees to furnish satisfactory men and the Company agrees that during the period that this agreement is in effect all replacements shall be hired through the offices of the Union, as vacancies occur. The Company may reject such replacements, provided:

(a) The rejections are for valid reasons, and

(b) The Company states in writing to the officers of the Union the reasons for such rejections, and that the Union shall have the right to take up such rejections under the grievance machinery outlined in subsections 3 and 4 of Section 7 and in Section 8 of Article I of this Agreement. When a rejection is made, the Union shall immediately supply a replacement. If the Union cannot furnish replacements by one (1) hour before sailing time, the Company shall have the right to obtain replacements wherever possible (Art. I, Sec. 2).

In operating under this clause, the N.M.U. gave preference to its members in supplying replacements; non-members of the N.M.U. were supplied only when N.M.U. members were unavailable (R. 8-9, 74-75, 85; 314-315, 408-411, 425-427, 847-856, 703, 223). This practice was required by the N.M.U.'s National Shipping Rules which provide that "only members in good standing as defined in the Constitution may register to compete for a job" (R. 9; 425, 848).

Prior to the expiration date of the 1947 contracts, petitioners met with representatives of each of the Companies to negotiate a new contract (R. 53-54, 73-74; 128, 130-132, 153, 155, 213, 250-254, 655-661). Numerous meetings were held between the N.M.U. and The Texas Company during the period from December 19, 1947 to June 11, 1948 (R. 54-55, 59, 63, 66, 68-69; 250-254, 261-262, 279,

293, 302, 306), and between the N.M.U. and a committee representing the other Companies during the period from December 18, 1947 to April 2, 1948 (R. 74, 76, 78; 153, 171, 185). Throughout the course of these meetings, the N.M.U. insisted upon the inclusion of the hiring hall clause of the 1947 contract in any new contract to be executed, and the Companies, contending that such a provision was illegal under the Labor Management Relations Act, refused to include such provision (R. 54-55, 59-62, 74-75, 76; 261, 263, 280-284, 157-158, 174).

To enforce their demand that the clause in dispute be included in the proposed new agreements or, in the alternative that the Companies agree to extend the 1947 agreements, including the hiring hall clause, petitioners called a strike among the unlicensed personnel operating the Companies' Great Lakes vessels (R. 7-8, 64, 81-82, 88-89; 358-360, 708-709, 190, 197-198, 214-215, 227-228). This strike commenced on May 13 and was still in progress when the Board hearing began on June 14, 1948 (R. 7-8, 64, 81; 198, 221, 356, 374, 384, 397).

The N.M.U.'s practice of giving preference to its own members in supplying replacements was well-known to the Companies (R. 9, 74-75, 85; 187, 222-223, 280-284, 314-315, 408-411, 703). During the bargaining conferences at which this practice was discussed, petitioners made clear to the Companies that they intended to continue the same discriminatory manner of supplying replacements

in the future (R. 19, 55, 59-62, 66, 67, 75, 79-80; 263, 280-284, 303, 304, 307, 158, 187).

All counter-proposals made by the Companies designed to permit petitioners to continue the use of their hiring halls but which would insure a supply of replacements on a non-discriminatory basis, were rejected by petitioners. Thus, on January 24, the Texas Company submitted to petitioners the following proposed substitute for the hiring hall clause (R. 56-57; 267-268, 665):

> When the Company requires a replacement it will notify the Union to such effect. If an applicant, referred by the Union as a result of such notice, reports for duty when the vacancy is still unfilled, such applicant shall be given the job, provided (a) he meets the Company's basic minimum standards of employment, and (b) unless, to give him the job, the Company would be required to discriminate against any other employee or applicant on account of membership or nonmembership in a labor organization, or for the purpose of encouraging or discouraging membership therein. Vacancies unfilled because of application of subdivision (a) hereof shall be handled in the same manner as other replacements.

Petitioners, however, rejected this proposal (R. 58, 66; 270, 303, 670-675) as well as another proposal made by The Texas Company on June 2, that a provision of the proposed contract be amended to proscribe discrimination, coercion or intimidation by The Texas Company or the N.M.U.

against any employee or applicant for employment (R. 67; 303-304). In rejecting the latter proposal, petitioners stated that it was just "unrealistic to suggest that they would treat applicants whether members or nonmembers alike in assigning them to ships" (R. 67; 304).

Similarly, at the first meeting between the N.M.U. and the Committee representing the other Companies, on December 18, 1947, the Committee, after pointing out that the manner in which the hiring hall operated resulted in discrimination against non-members of the N.M.U., suggested that a scheme might be devised "whereby the operators would notify the Union at any time that they might need help and that the Union, if they could get men down there, would probably be able to get the men hired" (R. 75; 158). This suggestion, however, was rejected by petitioners (*ibid.*). Again on February 27, the Companies expressed a willingness to agree to some provision whereby they would notify the N.M.U. whenever they needed replacements and suggested that they might "go along on some form of agreement, whereby the Union would register both Union and non-union men and send the operators a list of them so that [the operators] could sort of police the thing and see that no discrimination took place" (R. 76; 173-175). And on March 28 the Companies suggested in lieu of the hiring hall clause, a clause providing merely that the employer would advise the union's office "when in need of help" (R. 78; 629). The

N.M.U. did not accept any of these counterproposals (R. 77, 78-79, 80; 177, 186, 188). At the last meeting between the parties, on April 2, when discussing the manner in which the hiring hall system worked, petitioners "were very frank about the fact that * * * they gave the Union men preference whenever possible, because that is what they had a Union for" (R. 79-80; 187).

On the basis of these facts, the Board found that in the operation of the N.M.U. hiring halls in question, discrimination against non-members of the N.M.U. existed and that petitioners and the Companies "contemplated that such discrimination would continue if the hiring hall provision was included in the 1948 agreement. * * * Beyond the peradventure of doubt, the hiring hall in practice has involved discrimination in the hire and tenure of employment of unlicensed seamen to encourage membership in the N.M.U. * * * Moreover, it is clear from the record in this case that what N.M.U. was demanding in its negotiations, and in its strike, was not merely a continuation of the *form* of the hiring hall clause in its agreements with the Companies, but a continuation of the *practice* outlined above by which preference in job assignment and job retention was given to N.M.U. members" (R. 9-11). The Board concluded that for the Companies to operate under the hiring hall provision would be to discriminate in regard to the hire and tenure of their

employees, in violation of Section 8 (a) (3) of the Act, as amended (R. 9, 10-11, 14-15); and that petitioners, by insisting upon the hiring hall clause and conducting a strike to enforce their demand for its inclusion in any contract under which they might operate, violated Section 8 (b) (2) of the Act, as amended, which makes it an unfair labor practice for a labor organization and its agents to attempt to cause an employer to discriminate in violation of Section 8 (a) (3) (R. 5, 7-8, 11, 14-15).

The Board concluded further "that after considering and rejecting proposals by the Companies to substitute other arrangements for the hiring hall, a point was reached in the negotiations when [petitioners] made it clear that no new agreement would be concluded that did not contain a hiring hall provision comparable to that in the 1947 agreement, not only as to the language but also as to the method of execution;" and that by "their insistence upon the continuation of a practice which the Act now forbids as a condition precedent to entering into any agreement [petitioners] * * * refused to bargain in violation of Section 8 (b) (3) of the Act" (R. 18-19).

The Board accordingly ordered the petitioners, N.M.U. and its individually named agents, to cease and desist from refusing to bargain with the Companies; ordered the N.M.U. to cease and desist from "requiring, instructing, or inducing its representatives to require, that the Companies execute contracts which expressly, or in their performance,

make membership in the N.M.U. a condition of employment, except in accordance with the provisos in Section 8 (a) (3) of the Act" and the individually named petitioners from "requiring" the Companies to take such action; ordered the N.M.U. and the individually named petitioners to cease and desist from "directing, instigating, or encouraging employees to engage in a strike or approving or ratifying strike action taken by employees for the purpose of requiring the Companies to execute contracts" containing the prohibited provisions, and to cease and desist from causing or attempting to cause the Companies to discriminate in any manner against their respective employees in violation of Section 8 (a) (3) of the amended Act (R. 34-36). Affirmatively, the Board's order requires petitioners, upon request, to bargain collectively with the Companies, to post appropriate notices, and to notify the Board's regional director for the thirteenth region of compliance steps taken (R. 35-37).

On September 2, 1949, the Board filed in the court below a petition for enforcement of its order (R. 921-932). Thereafter, petitioners filed a motion for leave to adduce additional evidence regarding occurrences subsequent to the hearing before the Board (R. 933). This motion was withdrawn on May 2, 1949 upon the filing of a stipulation by the parties stating, *inter alia,* that subsequent to the Board hearing, the Companies had entered into an agreement with the N.M.U. incorporating the hiring hall clause in question and that no charges

had been filed against either the Companies or the N.M.U. as a result of such agreement (R. 933-937).

On July 1, 1949 the court below entered its opinion (R. 937-946) and, after denial of rehearing (R. 961-962), entered its decree on August 5, 1949 enforcing the order in full (R. 963-969).

ARGUMENT

1. Petitoners contend that because the hiring hall provision which they insisted upon did not, on its face, require that the Companies discriminate in favor of N.M.U. members, petitioners cannot be said to have attempted to cause the Companies to discriminate (Pet., pp. 25-29). But in arguing thus, petitioners ignore the fact found by the Board and supported by substantial evidence (*supra,* pp. 6-10) that petitioners' "bargaining demands and strike were calculated to cause the Companies not merely to agree to continuation of the hiring hall clause as such, but also to continue to cooperate in the practices flowing from execution of this clause, as a result of which N.M.U. members were given preference in employment over non-members" (R. 12).

Participation by the Companies in such practice could not lawfully be continued after the expiration of the 1947 contracts, for Section 8 (a) (3) of the amended Act makes this type of discrimination by an employer an unfair labor practice and does not permit the making of any bargaining agreement under which such a practice could con-

tinue.[2] Section 8 (b) (2) of the statute prohibits a labor organization or its agents from attempting to cause or causing an employer to discriminate against employees in violation of Section 8 (a) (3).

The prohibition is aimed not merely at proscribed union security agreements but at any attempt by a union or its agents to cause an employer to discriminate against employees in violation of Section 8 (a) (3). Hence, it is immaterial whether the hiring hall clause on its face requires the Companies to practice unlawful discrimination, since petitioners were plainly attempting to cause the Companies to cooperate in continuing the discriminatory practice of giving preference to N.M.U. members in filling vacanies.

2. Petitioners contend further that there can be no violation of Section 8 (b) (2) of the amended Act in the absence of a showing that petitioners have caused or attempted to cause the Companies to discriminate against specific individuals (Pet. 21-25). This contention has no basis in the statute,

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[2] Section 8 (a) (3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," provided that under certain prescribed conditions the employer may make a contract with a labor organization "to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later." Thus, the proviso does not permit the making of a contract requiring that a person *be* a member before hiring but permits a contract requiring him to *become* a member after hiring. It consequently outlaws preferential hiring and closed shop contracts.

in its legislative history, or in any of the Board or court decisions. The literal language of both Section 8 (3) of the Wagner Act and Section 8 (a) (3) of the amended Act prohibits the imposition by the employer of a requirement that employees be members of a union as a condition of employment when statutory requirements have not been met. Under the Wagner Act, an employer's conduct in entering into and retaining in effect an illegal closed-shop agreement had been held by the Board and the courts to constitute discrimination in conditions of employment within the meaning of Section 8 (3) of the Act. The reasoning behind these holdings was that those already employed at the time the contract was entered into were no longer free to refuse to join or to resign from the union and those seeking employment were similarly under illegal constraint to become members of the union. It was deemed immaterial that no employee had been discharged or refused employment because of failure to secure or maintain membership in the union. *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. 2d 652, 660 (C.A. 9); *Donnelly Garment Co.*, 50 N.L.R.B. 241, 246, 276, enforced, 165 F. 2d 940 (C.A. 8); *Highway Trailer Co.*, 3 N.L.R.B. 591, 609-610. The Board has taken the same view of Section 8 (a) (3) of the amended Act. *Amalgamated Meat Cutters & Butcher Workmen of North America*, 81 N.L.R.B., No. 164; *American Radio Ass'n.*, 82 N.L.R.B., No. 151; *International Typographical*

Union, 86 N.L.R.B., No. 115.[3] The petitioners, by insisting that the Board await a case of actual denial of employment, would deny to it the preventative power granted by Section 10 (a) of the Act.

That Congress meant to bar class discrimination as well as discrimination against specific persons is shown, moreover, in the legislative history of the Act by the express reference to the operation of the maritime hiring halls—which clearly favored a class—as an instance of a type of discriminatory practice which the amendments contained in Section 8 (a) (3) were designed to eliminate.[4]

Moreover, Section 8 (b) (2) is not, as petitioners assume, "necessarily coextensive with Section 8 (a) (3)" (Pet., p. 24). Section 8 (a) (3) of the amended Act, like the old Section 8 (3), proscribes only *discrimination* by the employer and does not proscribe *an attempt to discriminate.* Section 8 (b) (2), on the other hand, prohibits a union and its agents not only from *causing* the employer to discriminate, but also from *attempting to cause* him to discriminate.[5] Even if the Board and the

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[3] In *National Labor Relations Board* v. *Security Warehouse and Cold Storage Co.*, 136 F. 2d 829 (C.A. 9); *Continental Oil Company*, 65 N.L.R.B. 1400; and *Reeves-Ely Laboratories, Inc.*, 76 N.L.R.B. 728, cited at pp. 22-23 of the petition for a writ of certiorari, no charge was made that the conduct there dealt with was in violation of Section 8 (3) of the Act and that question was not before the Board or the court for decision.

[4] See S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 6; 93 Cong. Rec. 3836.

[5] As stated *supra*, pp. 12-13, it was stipulated by counsel for the Board and for petitioners in the court below that subsequent to the Board hearing in this case, the Companies acceded to

courts under the Wagner Act were wrong in finding "discrimination" where no specific individual had suffered loss of employment because of failure to acquiesce in a wrongfully compelled union membership, certainly there can be an "attempt to cause an employer to discriminate" although there is no showing that any specific individual would have suffered loss of employment if the attempt had been successful. The purpose of petitioners in insisting upon the hiring hall provision in any contract agreed upon, and calling a strike to enforce this demand, was obviously not alone to obtain mere words upon a piece of paper but actually to assure that the Companies would continue to give effect to the hiring hall provision by hiring N.M.U. in preference to non-union applicants for employment. Petitioners' conduct was thus an attempt to cause the Companies to discriminate against nonmembers of the N.M.U.

The court below, we submit, properly found "no rational basis" for petitioners' "argument that Section 8 (b) (2) does not make it 'an unfair labor practice' to attempt to cause an employer to discriminate against a group of employees or potential employees but only against some specified employees or potential employees" (R. 940-941).

3. Petitioners assert that even assuming that they were making a demand for an unlawful ob-

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petitioners' demand and executed contracts containing the controversial hiring hall clause. This fact was not before the Board and it did not, therefore, make any finding based thereon.

jective by insisting upon the hiring hall clause as a condition precedent to entering into any agreement, they nevertheless did not refuse to bargain with the Companies in violation of Section 8 (b) (3) of the amended Act (Pet., pp. 30-33). In support of this contention, they cite *National Labor Relations Board* v. *Corsicana Cotton Mills,* (C.A. 5), decided August 16, 1949, 24 L.R.R.M. 2494, wherein the Board sought to have an employer held in contempt of a previously issued consent decree requiring the employer to bargain. The court was "not in any doubt * * * respondent withheld recognition from the union as bargaining agent, as ordered by our decree, and caused a rupture of the bargaining negotiations," but declined to hold the employer in civil contempt because, in the court's view, "if the provisions of our decree have been disobeyed or violated, such violation was not intended but has resulted from a mistaken view of * * * the law and not from a purpose to violate the law or our decree" (*id.,* at 2496). The court therefore deferred final action upon the petition for contempt and directed the employer "to at once initiate a resumption of bargaining with the union in a sincere effort to reach an agreement" (id., at 2497). The court's deferment of final action, although apparently inconsistent with this Court's holding in *McComb* v. *Jacksonville Paper Co.,* 336 U. S. 187, 191, does not support petitioners' contention that

their insistence upon an unlawful condition cannot constitute a refusal to bargain so long as they believe in good faith that the condition is lawful. Whatever may be the proper rule in contempt cases, there can be no doubt that the Board may properly issue and the courts enforce remedial orders irrespective of the respondent's belief that the law was not being violated. *May Department Stores Co.* v. *National Labor Relations Board,* 326 U. S. 371, 385.

Section 8 (b) (3) of the amended Act imposes upon labor organizations and their agents the same duty to bargain collectively as is imposed upon employers under Section 8 (a) (5) of the amended Act (see H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 43). And the standards for collective bargaining enumerated in Section 8 (d) of the amended Act closely parallel those which the Board and the courts had developed under the Wagner Act for judging whether or not an employer had fulfilled his obligation to bargain collectively. Under the Wagner Act, the Board and the courts have consistently held that the insistence by an employer, as a condition precedent to entering into a collective bargaining agreement, that a labor organization agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act constitutes a refusal to bargain. The courts, without exception, have enforced

bargaining orders under such circumstances.[6] The court below therefore was constrained to uphold the Board's finding that petitioners refused to bargain with the Companies within the meaning of Section 8 (b) (3) of the amended Act by insisting upon the hiring hall clause as a condition precedent to the execution of any agreement.

4. Petitioners' procedural objections (Pet., pp. 33-35) based upon the Board's prompt issuance of a complaint, its conduct of a hearing twelve days later, and its refusal to grant a continuance (*supra*, p. 4), were properly found by the court below to be without merit (R. 938). Petitioners' procedural objection based upon Section 5 (b) of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C., Sections 1001-1011), herein called the A. P. A.,[7] was not raised before the Board, and peti-

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[6] *National Labor Relations Board* v. *Winona Textile Mills*, 160 F. 2d 201, 208-209 (C.A. 8); *Hartsell Mills Co.* v. *National Labor Relations Board*, 111 F. 2d 291, 292 (C.A. 4); *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. 2d 874, 883 (C.A. 1); *Stewart Die Casting Corp.* v. *National Labor Relations Board*, 114 F. 2d 849, 853 (C.A. 7), certiorari denied, 312 U. S. 680; *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 750-751 (C.A. 7), modified on rehearing, 119 F. 2d 1009, certiorari denied, 313 U. S. 565; *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. 2d 678, 680-681 (C.A. 6); *National Labor Relations Board* v. *George P. Pilling & Son Co.*, 119 F. 2d 32, 38 (C.A. 3).

[7] Section 5 (b) directs the administrative agency to "afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8."

tioners were therefore precluded under Section 10 (e) of the amended Act from raising such objection before the courts. *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388-389; *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U. S. 253, 255. But, in any event, the objection is without merit. Petitioners do not assert that the Board ever refused to receive or consider any offer to settle or adjust the issues between the time the charges were filed on May 27 and 28, 1948 and the commencement of the hearing on June 14, 1948 (R. 570-591, 602) or at any time thereafter. Moreover, the A. P. A. provides only that "where time, the nature of the proceeding, and the public interest permit," the parties shall be afforded opportunity to submit offers of settlement, and even then does not guarantee any particular amount of time. In view of the strike in progress among the Great Lakes seamen when the charges were filed and when the hearing commenced, the public interest required that the Board proceed with dispatch in conducting the hearing and deciding the issues.

The trial examiner's refusal to continue the hearing, under the circumstances, was likewise not error. But even if it had been error, petitioners were not prejudiced thereby in view of subsequent developments. As stated *supra,* p. 5, petitioners asserted at oral argument before the Board that they did not want the case reopened or any further hearing and were requesting only that the Board

incorporate as a part of the record the evidence regarding the hiring halls which petitioners intended to introduce in another proceeding then about to commence in New York. The Board granted this request and all evidence which petitioners asserted that they would have presented at the hearing in this case, had they not walked out, was incorporated as a part of the record. "Due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties." *Market Street Ry. Co.* v. *R. R. Comm.*, 324 U. S. 548, 562.

5. Nor is there merit to petitioners' contention that the statute, as applied by the Board, contravenes the First, Fifth and Thirteenth Amendments to the Constitution (Pet., pp. 36-41). The court below properly concluded (R. 945) that petitioners' contentions resting on the First and Fifth Amendments are met by this Court's decisions passing on the National Labor Relations Act before its amendment and on other Federal legislation [8] together with this Court's recent decisions concern-

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[8] See *e.g.*, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1; *United States* v. *Petrillo*, 332 U. S. 1; *International Assoc. of Machinists* v. *National Labor Relations Board*, 311 U. S. 72; *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U. S. 685; *Shields* v. *Utah-Idaho R. Co.*, 305 U. S. 177; *United States* v. *Darby*, 312 U. S. 100; *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154.

ing the validity of state laws banning union security agreements.[9]

The petitioners' main constitutional attack is based on the assumption that Congress, by Section 8 (a) (3) of the amended Act, provided a system of union security which protects other unions but not the N. M. U. because its members' full employment for any of the Companies so often runs for less than thirty days at a time. Without conceding that the union security system permitted by Section 8 (a) (3) of the amended Act is necessarily inapplicable to the maritime industry because of its peculiar hiring practices,[10] this fact, even if true, would not invalidate the law. For it is well settled that Congressional action is not to be set aside simply because the legislation in question, while generally and broadly fair, works relatively harsh results in some instances. *Bowles* v. *Willingham,* 321 U. S. 503, 516-519. Cf. *Euclid* v. *Ambler Co.,* 272 U. S. 365, 388-389; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 204; *L'Hote* v. *New Orleans,* 177 U. S. 587, 597-598.

The court below also properly held (R. 946) that since the Board's order is directed only against

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[9] *Lincoln Federal Labor Union* v. *Northwestern Co.,* 335 U. S. 525; *American Federation of Labor* v. *American Sash Co.,* 335 U. S. 538.

[10] Some of the cases heard by the Board have disclosed a pattern of continued employment of the same crew from trip to trip. See *National Labor Relations Board* v. *Waterman SS. Corp.,* 309 U. S. 206, 214; *Southern SS. Co.* v. *National Labor Relations Board,* 316 U. S. 31, 35, n. 5.

the N. M. U. and its agents, and not against the employees, there can be no basis for holding the "involuntary servitude" provision of the Thirteenth Amendment applicable here. See also *Pollack* v. *Williams,* 322 U. S. 4, 17-18; *United States* v. *Petrillo,* 332 U. S. 1, 12-13; *United States* v. *United Mine Workers,* 330 U. S. 258, 265-266, 268, n. 14, 307; *International Union* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 251, 259-260; *Butler* v. *Perry,* 240 U. S. 328, 332; *Robertson* v. *Baldwin,* 165 U. S. 275, 281-282; *Slaughter-House Cases,* 16 Wall. 36, 60; *United States* v. *White,* 322 U. S. 694, 704-705; *Arthur* v. *Oakes,* 63 Fed. 310, 318-320 (C.A. 7); *National Labor Relations Board* v. *Distillery Workers Union* (C.A. 2), decided December 12, 1949, 25 LRRM 2137, 2139.

6. In arguing that the Board's order, by ignoring the differences between hiring practices in the maritime industry as contrasted with those ashore, is inconsistent with the stated purposes of the Act (Pet., pp. 42-44), petitioners disregard those sections of the statute which expressly proscribe the type of conduct covered by the Board's order as well as the legislative history of the statute. The Board and the court below (R. 13-14, 941) properly disposed of this argument by pointing out that:

> "Insofar as such factors touch upon the wisdom of the legislation which renders the N. M. U. hiring halls unlawful, they, of course, raise considerations which can have no bearing

on our determination of the issue before this Board. The full facts concerning the reasons for and operation of maritime hiring halls were brought to the attention of the Congress prior to the enactment of the amended Act.* The Congress determined that the public interest required that hiring halls involving discrimination against employees who are not union members be outlawed.** This determination is binding upon us. It is our duty to administer the law as written, not to pass upon the wisdom of its provisions."

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* See, for example, *Senate Hearings* [before the Committee on Labor and Public Welfare] *on S. 55 and S. J. Res. 22*, 80th Cong., 1st Sess., p. 1396 ff.

** In the course of the Senate debates on the provision which ultimately was incorporated as Section 8 (a) (3) of the amended Act, there are a number of specific references to the hiring hall in the maritime industry as a classic example of the "closed shop" which the provision was primarily designed to eliminate. The Senate Report on S. 1126 stated:

> In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. (*Senate Report No. 105*, 80th Cong., 1st Sess., p. 6)

Presenting the Senate Bill, Senator Taft, one of its sponsors, stated:

> In the first place, Mr. President, the bill does abolish the closed shop. Perhaps [that] is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to [them]. [93 Cong. Rec. 3836].

CONCLUSION

Since the decision below is clearly correct it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1950.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

* * * * *

SEC. 8. It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. II, Secs. 141, *et seq.*), are as follows:

* * * * *

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms

and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9 (a);

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and

the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to

make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. * * *

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